NO. 13673

United States
COURT OF APPEALS

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO) and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellant,

vs.

MARTIN E. ADEN, et al,

Appellees.

REPLY BRIEF OF APPELLANT HAWAIIAN PINEAPPLE COMPANY, LTD.

On Appeals from the United States District Court for the District of Oregon

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SUBJECT INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

TABLE OF AUTHORITIES (Cont.)

Miscellaneous

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I.

The District Court Failed and Refused to Submit to the Jury the Issue of the Common Law Liability of the Individual Appellees, Regardless of Their Being Co-conspirators, and Erroneously Instructed the Jury Thereon.

A. Hapco's Theory as to the Liability of the Appellees Was not Submitted by the District Court (Reply to Appellees' Brief I, pp. 4-12).

In substance, the argument running through all of appellee's brief is that in the court below Hapco claimed the individual appellees were liable for engaging in a conspiracy to violate the provisions of Section 303 of the Labor Management Relations Act, 1947, which theory the District Court is said to have accepted (Br. 5). However, appellees intimate that on this appeal Hapco has changed its position and now seeks to hold the individuals liable for the particular damage done by each individual appellee (Br. 2, 4-5, 11, 15-16).

In making this argument, appellees are simply in error as to Hapco's position, both in the court below and on this appeal. What appellees have done is to set up two straw men (their notion of Hapco's position below and of its position here) which they then proceed to attack. To clarify the resulting confusion, it is necessary to distinguish among the various theories of liability of the individual appellees.

[Hapco's Theory]

Hapco has always sought to establish the liability of the individual appellees upon the legal basis that they engaged in various unlawful activities, pursuant to an alleged cospiracy with the unions to injure Hapco's business.

Such a position presents a twofold way of establishing the liability of any individual: Either he was part of the alleged cospiracy or he engaged in an unlawful act. In this case Hapco sought to recover against the individual appellees on such a twofold basis: (1) the individual appellees and the unions were part of an unlawful common law conspiracy to injure Hapco's business and property, and (2) the individual appellees participated in the unlawful invasion of the Port dock and the destruction of Hapco's property and injury to its employees and were jointly liable for the wrongs thereby inflicted on Hapco.

Hapco's position in the court below, as here, was and is that, in addition to the conspiracy charge and regardless of whether it was proved, Hapco was entitled to have submitted to the jury the issue of the joint common law liability of the appellees, or any of them, for participating in the unlawful acts involved in the rioting against Hapco. This was unequivocally set forth during the trial by Hapco's counsel, Mr. Krause, when he stated:

> *". . . if we are to recover on this conspiracy against the individuals, it has to be on one of two theories: Either that it was all due to their participation in a riot, or a conspiracy in which they par-*

ticipated with others to do damage to our business." (Tr. 926)

All the signifcant signposts along the route of the trial bear this out: Hapco's Pre-Trial contention 6 (d) (Tr. 58-59); Pre-Trial issues No. 8, 9, 10, 11, 16 (Tr. 67); Hapco's requested instructions (Tr. 130-131, 133-134); and Hapco's exceptions to the Court's instructions (Tr. 1450-1451).

It should be kept in mind that in the Pre-Trial Order originally submitted to the District Court, Hapco set forth three separate counts or theories: the first two were directed only against International and Local 8 for violating Section 303 (a) (1) and Section 303 (a) (4) of the Act pursuant to a conspiracy between them; and the third one was against the individual appellees and the two unions for committing various unlawful acts (including the riot against Hapco) pursuant to a conspiracy to injure plaintiff's business (Tr. 205, 290, 294). The District Court directed that these three theories be amalgamated or consolidated in one contention, stating that there was only one series of damage involved (Tr. 295, 299).

Accordingly, the broad conspiracy allegation which was thereafter incorporated in Hapco's contentions (Tr. 57-60) was necessarily cast, in part, in terms of the language of Section 303 of the Act. However, Hapco was still proceeding against the unions for violating the Act and against the individuals and unions for various unlawful acts pursuant to a conspiracy to injure its business, as can be seen from the very first requested instruction which Hapco submitted to the District Court:

"The plaintiff, Hawaiian Pineapple Company, Ltd., is seeking to recover damages from the defendant International, from the defendant Local 8, and from the various individual defendants upon different grounds. *On one ground,* the plaintiff is proceeding against the defendant International and the defendant Local 8 on the basis that these two unions have violated the Labor Management Relations Act of 1947. *On another ground,* the plaintiff is proceeding against the various individual defendants and also the defendant International and the defendant Local 8 on the basis that all of these defendants have committed various allegedly unlawful acts pursuant to a conspiracy among themselves as a result of which the plaintiff claims to have been injured in its business and property." (Tr. 123) (Italics supplied)

[District Court Theory]

The District Court submitted to the jury a theory of liability of the individual appellees quite different from that which Hapco requested. It instructed the jury that it could return a verdict against the individual appellees only if (1) one or both unions were first liable under the Act (Tr. 1435, 1440), (2) the individual was a member of a conspiracy with either or both unions (Tr. 1436-1437, 1438, 1440), and (3) the conspiracy was, in effect, to engage in the conduct prohibited by Section 303 (a) (1) of the Act (Tr. 1436-1437, 1439-1440).

It will thus be seen that the District Court instructed the jury on the liability of the individual appellees *only* upon the basis of their being involved in a conspiracy with either or both unions. It did not, and refused to, instruct the jury as to the liability of the individual appellees for having participated in the rioting against

Hapco regardless of whether they were involved in a conspiracy[1].

[Appellees' Straw Men]

From the above review, it is evident that the District Court did not adopt or instruct in accordance with Hapco's position as to the liability of the individuals. Moreover, it is evident that Hapco's position in the court below is the same one which it is now asserting.

We may now lay to rest appellees' two straw men: Their notion that Hapco sought in the District Court to hold the appellees for a conspiracy to violate Section 303 (Appellees' Br. 5); and their apparent notion that Hapco seeks in this Court to hold the appellees liable for the particular damage each has done (Appellees' Br. 2, 4-5, 11, 15-16).

To support these notions, appellees assert that Hapco made no effort to distinguish between the activities of the various individual appellees or to determine the exact amount of damage each one may individually have done (Appellees' Br. 7-11); and that the verdict forms submitted by Hapco did not contain a blank space next to the name of each individual appellee for inserting the damages assessed against him (Appellees' Br. 11).

Insofar as Hapco was proceeding against the individuals for being involved in a conspiracy with the unions to injure and boycott its business, no distinction between

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[1]Even appellees concede that the instructions of the District Court did not allow the jury to consider the liability of the individual defendants separate and apart from their being involved in a conspiracy with the unions (Appellee's Br. 2).

the activities or responsibilities of any of the individual appellees was required. If the alleged conspiracy were proven, it is axiomatic that each of the individual appellees who had been a part thereof would be liable for the entire damages resulting from the conspiracy.

Similarly, insofar as Hapco was proceeding against the individual appellees for having participated in the unlawful rioting against Hapco, there was once again no legal requirement that Hapco charge or prove the specific damage that may have been done by any one individual appellee.

All of the individual appellees who participated in the unlawful rioting against Hapco were liable for the consequent damages flowing therefrom irrespective of their degree of participation. See: 52 Am. Jur., Torts, Secs. 111, 116, pp. 450, 455; 46 Am. Jur., Riots and Unlawful Assembly, Sec. 18, p. 135; Cooley on Torts (4th Ed.), Secs. 81, 85, 74; Restatement of Torts, Sec. 876. As the Court of Appeals for the Eighth Circuit stated in *Meints v. Huntington,* 276 F. 245 (1921), a case involving an alleged conspiracy by many persons who deported the plaintiff across state lines and beat him.

> ". . . the question as to whether there was a conspiracy became wholly immaterial; *for as to each participant the law is unconcerned with the extent or degree of his activity when it comes to consider the question of liability,* and places all on the same footing, each equally liable jointly and severally, regardless of whether a conspiracy theretofore had been entered into." (Italics supplied) (276 F. at p. 248).

It was on this basis that Hapco sought only one sum of damages from all of the individual appellees who participated in the rioting. Hapco recognized, however, that if the jury did not find the alleged conspiracy, the damages resulting from the riot might be different and less than the damages resulting from the alleged conspiracy (Tr. 1408-A). Hence Hapco submitted a requested instruction concerning damages to be used by the jury in the event that they found "from a preponderance of the evidence that there was no conspiracy" (Tr. 133).

In a similar vein, the three verdict forms submitted by Hapco reflected its position with respect to the liability of the unions and the individuals (Tr. 1408). The first one was a verdict in favor of the plaintiff and against the defendants and allowed the jury to assess Hapco's damages at one sum of money; the second one was the same, except that all of the defendants were specifically listed and the jury was instructed to strike out the names of the defendants against which the verdict was not returned. These first two forms of verdict covered Hapco's case against the two unions for the charged violation of Section 303, and also against the individual appellees and the unions for engaging in a conspiracy to injure its business. The third form of verdict allowed the jury to return a verdict in favor of Hapco and against the two unions in a blank amount and also permitted them to return a verdict against the individual appellees (whose names were not struck out) in a blank amount. This last form enabled the jury (a) to find against the unions for violating the Act and (b) in the

event that the jury did not find a conspiracy between the individuals and the unions, to find against the individual appellees who participated in the riot against Hapco.

B. Hapco took Appropriate Exceptions in the District Court (Reply to Appellees' Brief II, pp. 12-17).

Like appellees, Hapco agrees with, and has invoked in its answering brief (pp. 54-55) on the cross-appeal herein, the well-settled principle embodied in Rule 51 of the Federal Rules of Civil Procedure that a party may not assign as error the giving or failing to give an instruction unless he objected thereto at the time of trial and stated distinctly the grounds of his objection.

The purpose of Rule 51 in this respect is to call the attention of the Court to any omissions or mistakes in his charge so that he may have an opportunity to correct them before the jury finally retires. See Barron & Holtzoff, Federal Practice and Procedure (Rules Ed., 1950), Vol. 2, Section 1101, et seq.

Such an opportnuity was amply afforded to the District Court to correct the errors which Hapco now urges on this appeal. Specific instructions were requested on Hapco's theory that the individual appellees were liable for their riotous invasion of the dock (Tr. 130-131). Specific exceptions were taken to the refusal of the Court to instruct that Hapco could recover against the individuals because of the physical activities in which the individual appellees engaged. It was em-

phasized that a cause of action was stated against the individuals for their riot and other physical activities in stopping Hapco's business (Tr. 1450-1451).

Concurrently, Hapco took specific objection to the instructions of the Court to the effect that there could be no verdict against the individual appellees unless the unions were also found liable, pointing out that the cause of action against the individual appellees was broader than a conspiracy to restrain trade and was directed against and included the riot and other activities that the individual appellees engaged in to physically stop Hapco's business (Tr. 1450).

We submit that the requested instructions, taken together with the exceptions urged against the failure to give them and against the instructions actually given, were sufficient to put the District Court on notice and afford it an opportunity to submit to the jury instructions permitting them to find the individual appellees liable for their unlawful activities in rioting against Hapco on the dock, regardless of whether such activities were pursuant to a conspiracy. As noted below, the cases cited in appellees' brief, if anything, support Hapco[2].

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[2]Bercut v. Park Benziger & Co., 150 F. (2d) 731, 734 (CA 9, 1945) (Specification of error for failing to give an instruction *held* unavailing where there had been no request at all for such an instruction nor timely objection to the Court's omission to so instruct); Christensen v. Trotter, 171 F. (2d) 66, 68 (CA 9, 1948) (Objection to instruction which was not made to the trial court *held* cannot be made for the first time on appeal); Shevlin-Hixon Co. v. Smith, 165 F. (2d) 170, 179 (CA 9, 1947) (Specification of error that the trial court failed to instruct the jury properly on certain subjects *held* unavailing where specifications completely disregarded Rule 20 (d) of Ninth Circuit requiring requested instructions be set out "totidem verbis" and where two of the specifications of errors were not even urged to the trial court).

Appellees next assert that the verdict against the unions made harmless the Court's instructions (Tr. 1435, 1436-1437, 1438-1439, 1439-1440) to the effect that the individual appellees could only be liable if one or both of the unions were found liable under the Act and the individual appellee was a member of the conspiracy between either or both of the unions and the individual appellees (Appellees' Br. 13). This is not true. Before an individual appellee could be found liable, the Court still required that he be part of a conspiracy between the unions or either of them and the individual appellees to in effect violate the requirements of Section 303 (a) (1) of the Act. Hapco took exception to this tieing together of the unions and individual appellees, pointing out to the Court that the jury could bring in a verdict against the individuals even though they did not bring in one against the unions (Tr. 1450).

It is then said that we did not object to the Court's instructions that "if the sole object of the activities was to protect wages and working conditions, then appellees would not be liable" (Appellees' Br. 13). However, the instruction referred to by appellees relates only to the two unions, not to the individual appellees; and furthermore deals only with Hapco's case against the two unions under the Act (Tr. 1429).

It is next said that Hapco did not except on the ground "that the jury was not permitted to find damages as to any individual other than by virtue of a conspiracy, which is the main claim in its brief" (Appellees' Br. 14). On the contrary, Hapco submitted instructions covering its position that the individual appelles were

liable as a result of their being part of a conspiracy with the unions to injure Hapco's business (Tr. 129-130). Hapco also provided for the possibility that the alleged conspiracy might not be found by submitting instructions covering the liability of the individual appellees for participating in the riot against Hapco (Tr. 130-131) and as the measure of damages (Tr. 133); and excepted to the failure of the Court to instruct that Hapco could recover upon the latter basis (Tr. 1450-1451).

We are unable to discover the inconsistency asserted by appellees (Br. 15) in two of Hapco's requested instructions concerning the liability of the individuals for rioting upon the dock (Tr. 130-131). Both look to the actions of the individual appellees in invading and rioting upon the Port dock; one dealing particularly with the purpose and effect of the invasion (Hapco having contended that the appellees were engaged in boycotting its cargo and business) and the other dealing with the specific activities of the appellees in assaulting Hapco's employees and damaging its property and cargo.

Hapco's requested instruction dealing with the assessment of damages (Tr. 133-134) is, in this part of appellees' brief, properly recognized as proceeding on the theory that in the absence of a conspiracy the individual appellees, who participated in the unlawful activities, are liable for all of the damages sustained by Hapco as a result thereof (Appellees' Br. 15). However, appellees' criticism of this instruction as not permitting the jury to award a certain amount of damages against each individual for the specific wrong he personally committed,

again reflects its misconception of Hapco's position. As we have noted, this instruction embodies the law that, in the absence of a conspiracy, the individual appellees who participated in the riot against Hapco were nonetheless jointly liable for all of the damages done thereby to Hapco.

C. Conspiracy not Gravamen of Hapco's Action (Reply to Appellees' Brief III, pp. 17-23).

Appelles seek to avoid the application of the principle that a plaintiff may recover against several defendants engaging in tortious acts against it, even if an alleged conspiracy is not proved, by reference to a distinction sought to be drawn in 152 A.L.R. 1147 to the effect that in some cases conspiracy must be proved in order to impose joint liability[3].

Appellees ignore, however, the fact that cases said to constitute an exception to or a limitation upon the general principle involve situations in which reliance is placed upon the acts of several defendants, no one of

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[3]The annotator has expressed his conception of cases said to form a limitation upon the general principle that conspiracy is not the gravamen of an action, as follows:

> "Where liability is dependent upon some theory of conspiracy, in the sense that only joint or co-operative action apart from collective conduct that no individual can be separately charged with responsibility for the damage claimed, upon the ground urged, as shown by the inherent nature of the wrongful conduct or the manner in which it is alleged, and there is, in such a situation, no separate wrong which would support an action apart from collective conduct or participation based upon a concert of design or conscious effort, failure to prove an allegation of conspiracy is tantamout to a failure of the action." (152 A.L.R. at 1154)

whom standing alone would be liable, or involves several acts different in character and in time, in some of which not all of the defendants participated. See 152 A.L.R. at 1148 and 1154. As a reading of the cases said to constitute a limitation will show, the case at bar can hardly be lumped with them. Here all of the individual appellees were alleged to be engaged in the same unlawful activities at the same time and place and furthermore the act of any one individual appellee standing alone was unlawful and actionable.

Next, appellees assert that "the authorities are in agreement" that a distinction cannot be made between liability for a conspiracy and liability for a riot (Appellees' Br. 19). Appellees, however, have not cited "the authorities" to which they refer, unless it be *Salem Manufacturing Company v. First American Fire Insurance Company of New York,* 111 F. (2d) 797 (CA 9, 1940), in which neither the language nor the ratio decidendi of the case distinguishes between a conspiracy and a riot or requires proof of a prior conspiracy in order to show a concert of action.

Regardless of whether Hapco proved its alleged conspiracy, we submit that the law is clear that joint liability may be imposed upon the appellees who acted together in the infliction of wrongs against it. All that is required to impose such joint liability is, in effect, a concert of actions by two or more persons who commit the wrong complained of. *Meints v. Huntington,* 276 F. 245 (CA 8, 1921); *Martin v. Ebert,* 245 Wisc. 341, 13 N.W. (2d) 907 (1944). Accord, *Reyher v. Mayne,* 90

Colo. 586, 10 P. (2d) 1109 (1932); *Benson v. Ross,* 143 Mich. 452, 106 N.W. 1120 (1906); *Oliver v. Miles,* 144 Miss. 852, 110 So. 666 (1926); *Troop v. Dew,* 150 Ark. 560, 234 S.W. 992 (1921). That a jury can infer such a concert of action from the nature and circumstances of the defendants' wrongful acts is clear. See *Calcutt v. Gerig,* 271 F. 220, 222 (CA 6, 1921).

As one well-known commentator has expressed it, joint liability may be imposed upon several tort feasors even if these is no pre-arranged plan or agreement, if "one person acts to produce injury with full knowledge that the others are acting in a similar manner and that his conduct will contribute to producing a single harm." Harper on Torts (1933 Ed.) p. 676.

Appellees also suggest that the instructions of the District Court did not really require the jury to find that the liability of the individual appellees depended upon their having been part of a conspiracy with the unions. We submit that a reading of all of the instructions dealing with the liability of the individual appellees can only lead to the conclusion that individual liability depended upon being a member of a conspiracy between either or both of the unions and the individual appellees (Tr. 1436-1437, 1438, 1440). Appellees have quoted an isolated part of the Court's instruction (Tr. 1436-1437), but in so doing they have omitted the key portion of it dealing with the nature of the conspiracy of which the individual appellees had to be a member, namely a conspiracy in effect to violate the Act by inducing or encouraging the employees of any employer by concerted

action in the course of their employment to refuse to transport, handle or work upon the pineapple cargo, or to perform any services in connection therewith, with the object of forcing any employer or any person to cease doing business with any other person.

Appellees also say that under the instructions requested by Hapco the jury might have been led to believe that an individual, who was part of a group of which some members were involved in unlawful activities, might be held for all of the damages committed by any members of the group even though there was no concert of action between them (Appellees' Br. 20-21). We cannot follow this contention. Hapco's requested instructions clearly required the jury to find that the individual appellees invaded the dock together and there engaged in a riot, and further specifically provided that a verdict should only be returned against such individuals who "participated" in such an invasion and riot (Tr. 130-131).

Finally, appellees again suggest that Hapco did not take any exception to any instruction "by which the jury was required to find that the individuals were engaged in a conspiracy with the unions in order to be held liable." (Appellees' Br. 22). In so saying, appellees disregard the exceptions which appellee took (Tr. 1450) in which Hapco stated that its theory was that "there is a cause of action stated against them [the individuals] that was broader than a conspiracy to restrain trade and that is to just physically stop a business operation in connection with the riot and other activities that they engaged in."

II.

The Labor Management Relations Act, 1947, Has Not Pre-empted the Field of Individual Liability for Tortious Conduct (Reply to Appellees' Br. pp. 23-29).

Hapco has no quarrel with appellees' contention that a suit for damages under Section 303 of the Labor Management Relations Act may not be brought against an individual union member (in contrast to a "labor organization") for his having engaged in conduct prohibited by that section. For the violation of Section 303 (a) (1) of the Act involved in this case, Hapco has not and is not seeking to impose liability on the individual appelles but only on International and Local 8.

Nor do we have any quarrel with the so-called doctrine of pre-emption that where Congress has acted in an area of concurrent federal and state jurisdiction (such as the regulation of labor relations), state statutes or common law are superseded by the federal law, provided the intention of Congress to nullify the state law is clear and unequivocal. See 11 Am. Jur., Commerce, Secs. 22, 23 and 24, pp. 23-27. But we cannot accept the conclusion which appellees desire to draw from this doctrine, viz, that since the Act has limited liability for violations to labor organizations, "individuals cannot be subjected to liability merely because their conduct may give rights to a common law action or an action based upon a state statute" (Appellees' Br. 28).

Such a conclusion involves a misapplication of the doctrine of pre-emption. It presents the question of whether Congress in limiting damage suits under Section 303 to "labor organizations" acted in such a way to invalidate state common law that individuals are liable for their torts inflicted in the course of labor strife.

A review of the legislative history indicates that the only intention of Congress was to limit the scope and application of Section 303 to labor organizations and not to restrict the application of state law to individuals for their tortious acts[4]. Mere silence by Congress does not justify the negation of state law; and the failure of Congress to include individuals within Section 303 does not thereby preclude the application of state common law.

In *Direct Transit Lines v. Local 406,* 199 F. (2d) 89 (CA 6, 1952), relied on by appellees (Br. 26-28), no individual defendants were involved. The question before the Court was whether state law could regulate the activities of labor organizations which were exclusively within the scope of the Act, and not whether silence by Congress excluded the application of state law to the torts of individuals.

More in point on appellees' contention is *Utah Labor Relations Board v. Utah Valley Hospital,* 235 P. (2d) 520 (Utah, 1952), where a hospital refused to obey the order of a state agency that it enter into collective bar-

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[4]Senate Report No. 105, 80th Cong., 1st Sess., pp. 54-56; 93 Cong. Rec. 4677-4681, 4770, 4834, 4837, 4839-4840, 4843, 4847, 4858, 4859-4860, 4867, 4868, 4871, 4872-4873, 4874; House Report No. 510, 80th Cong., 1st Sess., p. 67; 93 Cong. Rec. 6445, 6536.

gaining, contending that Congress had pre-empted the field and thereby excluded state control. Since Congress had expressly excluded non-profit charitable hospitals by amendment from the Labor Relations Act, the Court held that the field was therefore left open to regulation by the state, stating (at p. 523);[5]

> "It would seem paradoxical indeed to hold . . . that the hospital is beyond the control of the Utah Legislature because it is controlled by the act of Congress, which by its very terms excludes the Hospital from its operation."

So in the case herein, it is inconceivable that the individual appellees are beyond the control of state common law because they are assertedly controlled by Section 303 of the Act, which does not even mention individuals. Congress never did bring within the scope of the Act the liability of individuals for their tortious conduct in the course of secondary boycotts. It considered and rejected language which would have permitted Section 303 damage suits against individuals. Having thus never been within the scope of Federal legislation, it is difficult to conceive why state common law should be impaired by the silence of Section 303 with respect to the liability of individuals.

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[5]The hospital later presented its argument that the state agency was without jurisdiction because the Act had preempted the field to a Federal District Court, which dismissed its complaint, and to the Court of Appeals of the Tenth Circuit which affirmed the dismissal. Utah Valley Hospital v. Industrial Commission of Utah, 199 F. (2d) 6 (1952).

CONCLUSION

We submit that Hapco should be granted a partial new trial on the limited and separable issue which has never been passed upon in this case: the liability of the appellees for their tortious conduct in the riot staged against Hapco on the Port dock.

Hapco raised this ssue in the District Court and supported it with unchallenged evidence of the wrongs done to it by the individual appellees. In all fairness, we submit, that Hapco is entitled to its day in court on this issue.

Respectfully submitted,

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